Supreme Court, U.S.
FILED

941658 APR 10 1995

OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

AMCAST INDUSTRIAL CORPORATION and
ELKHART PRODUCTS CORPORATION,
Petitioners,

v.

DETREX CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

ANN WIGHTMAN *
PAUL L. HORSTMAN
MARY L. WISEMAN
FARUKI GILLIAM & IRELAND
600 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, OH 45402
(513) 227-3707
Attorneys for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Whether the mandate of 42 U.S.C. § 9613(g)(2)—that a declaratory judgment on liability for environmental response costs is binding in all subsequent actions to recover further response costs—should be applied to an order quantifying attorneys' fees and costs that were awarded, consistent with the law at the time, as response costs under CERCLA in a declaratory judgment affirmed on appeal and from which certiorari was denied prior to this Court's decision in *Key Tronic Corp. v. United States,* —— U.S. ——, 114 S. Ct. 1960 (1994).

2. Whether a declaratory judgment deciding Petitioners' entitlement to recover attorneys' fees and litigation expenses as response costs, pursuant to § 42 U.S.C. § 9613(g)(2), is binding under *res judicata* or collateral estoppel principles regardless of a subsequent change in the law by *Key Tronic v. United States,* —— U.S. ——, 114 S. Ct. 1960 (1994), which determined that response costs under CERCLA do not include attorneys' fees and expenses incurred in litigation.

THE PARTIES

Petitioners are Amcast Industrial Corporation ("Amcast") and Elkhart Products Corporation ("EPC"), a wholly-owned subsidiary of Amcast. Respondent is Detrex Corporation ("Detrex").

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
THE PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	3
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
A. Introduction	3
B. Procedural History of the Case and Jurisdictional Statement	5
REASONS FOR GRANTING THE PETITION	7
I. CERCLA, 42 U.S.C. § 9613(g)(2), MANDATES THAT THE DECLARATORY JUDGMENT AWARDING AMCAST AND EPC RESPONSE COSTS THAT INCLUDE ATTORNEYS' FEES AND LITIGATION EXPENSES, WHICH WAS AFFIRMED IN AN EARLIER APPEAL, IS BINDING IN A SUBSEQUENT PROCEEDING AND APPEAL REGARDLESS OF A CHANGE IN LAW ANNOUNCED AFTER THE CONCLUSION OF THE FIRST APPEAL	10
A. Statutory Language and Legislative History	10
B. Detrex Fully and Completely Litigated the Recoverability of Attorneys' Fees as Response Costs in the First Detrex Appeal; the Seventh Circuit Erred in Not Giving the Declaratory Judgment Binding Effect as to Amcast's and EPC's Entitlement to Attorneys' Fees	14

TABLE OF CONTENTS—Continued

Page

II. THE SEVENTH CIRCUIT'S FAILURE TO GIVE BINDING EFFECT TO THE DECLARATORY JUDGMENT ON PETITIONERS' ENTITLEMENT TO RECOVER ATTORNEYS' FEES VIOLATES THE PRINCIPLES ESTABLISHED BY THIS COURT GOVERNING THE EFFECT OF A CHANGE IN LAW ON FINAL JUDGMENTS 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

	Page
Amcast Indus. Corp. v. Detrex Corp., 45 F.3d 155 (7th Cir. 1995)	*passim*
Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746 (7th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S. Ct. 691 (1994)	2, 3
Detrex Corp. v. Amcast Indus. Corp., —— U.S. ——, 114 S. Ct. 691 (1994)	5
Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 101 S. Ct. 2424	16, 17
Gilldorn Savings Ass'n v. Commerce Savings Ass'n, 804 F.2d 390 (7th Cir. 1986)	14
Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 98 S. Ct. 2370 (1978)	10
Harper v. Virginia Dep't of Taxation, —— U.S. ——, 113 S. Ct. 2510 (1993)	10, 17
In re Dant & Russell, Inc., 951 F.2d 246 (9th Cir. 1991)	12
James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S. Ct. 2439 (1991)	10, 17
Key Tronic Corp. v. United States, —— U.S. ——, 114 S. Ct. 1960 (1994)	3, 5
Lummus Co. v. Commonwealth Oil Refining Co., 297 F.2d 80 (2d Cir. 1961)	14-15
Miller Brewing Co. v. Joseph Schlitz Brewing Co., 605 F.2d 990 (7th Cir. 1979)	14
Packard Motor Car Co. v. NLRB, 330 U.S. 485, 67 S. Ct. 789 (1947)	11
United States v. American Trucking Ass'n, 310 U.S. 534, 60 S. Ct. 1059 (1940)	11
United States v. Missouri Pacific R.R. Co., 278 U.S. 269, 49 S. Ct. 133 (1929)	11

STATUTES

28 U.S.C. § 1254(1)	3
28 U.S.C. § 1291	14
42 U.S.C. §§ 9601-9675	1
42 U.S.C. § 9607(a)	4
42 U.S.C. § 9613(b)	3
42 U.S.C. § 9613(g)(2)	*passim*

TABLE OF AUTHORITIES—Continued

RULES

Page

Fed. R. App. P. 40 4

MISCELLANEOUS

62 U.S.L.W. 3279 (U.S. Oct. 12, 1993) (No. 93-376) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. ———

AMCAST INDUSTRIAL CORPORATION and
ELKHART PRODUCTS CORPORATION,
Petitioners,

v.

DETREX CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The district court granted Petitioners Amcast and EPC summary judgment on their CERCLA [1] claims against Respondent Detrex for environmental response costs as reported at 779 F. Supp. 1519 (N.D. Ind. 1991) and 822 F. Supp. 545 (N.D. Ind. 1992). Pursuant to 42 U.S.C. § 9613(g)(2), the district court, among other things, entered a final declaratory judgment, corrected by an order issued December 8, 1992 ("Corrected Judgment"), Record Vol. 16, No. 376, adjudicating that:

---

[1] Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675.

> "Declaratory judgment is entered for the plaintiffs as to defendant Detrex's liability for all future response costs incurred by plaintiffs in responding to the TCE contamination at plaintiff Elkhart Products' Plant in Elkhart, Indiana. *The future response costs for which defendant Detrex* and its successors or assigns *are liable include attorney fees, litigation, and [sic] expenses and prejudgment interest.*" (Emphasis added).

On appeal, the Seventh Circuit Court of Appeals affirmed the declaratory judgment in all but one respect unrelated to the amount or nature of the response costs awarded. *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S. Ct. 691 (1994). After this Court denied Detrex's petition for a writ of *certiorari* and the case returned to the district court, the district court further quantified the response costs for which Detrex was liable as $554,494.71 for attorneys' fees and litigation expenses, $30,636.76 in additional response costs, and $315,359.47 in prejudgment interest. Judgment in Civil Case and Memorandum and Order, March 31, 1994, Appendix, pp. 10a-36a. Detrex timely appealed that judgment which further quantified the response costs awarded, including attorneys' fees and other litigation costs, to the Seventh Circuit Court of Appeals.

Petitioners moved to dismiss that portion of Detrex's second appeal that sought to (1) reargue, based on the National Contingency Plan ("NCP"), whether Detrex was liable under CERCLA for any response costs and (2) excise from the response costs awarded any sums relating to attorneys' fees or litigation expenses. The Seventh Circuit dismissed the second appeal to the extent that Detrex sought to relitigate whether it was liable under CERCLA. App., p. 37a. The Seventh Circuit allowed the second appeal to proceed, insofar as it challenged whether attorneys' fees and expenses were compensable response costs under CERCLA. Although petitioners had been awarded attorneys' fees and expenses

as response costs under the first full appeal, the Seventh Circuit reversed the award of attorneys' fees and costs based on the application of *Key Tronic Corp. v. United States*, —— U.S. ——, 114 S. Ct. 1960 (1994), which was decided while the second appeal was pending. 45 F.3d 155 (1995) (App., p. 1a). The Seventh Circuit's decision, nullifying an award of attorneys' fees and litigation expenses as response costs that had been affirmed in a prior appeal, conflicts with the express language of 42 U.S.C. § 9613(g)(2).

JURISDICTIONAL STATEMENT

The Seventh Circuit Court of Appeals entered judgment on January 10, 1995. This Court has jurisdiction to review the Seventh Circuit's judgment by writ of *certiorari* pursuant to 28 U.S.C. § 1254(1). The district court possessed jurisdiction pursuant to 42 U.S.C. § 9613(b).

STATUTORY PROVISIONS INVOLVED

This case concerns the interpretation and application of 42 U.S.C. § 9613(g)(2), which is set forth at App., p. 123a.

STATEMENT OF THE CASE

A. Introduction

Pursuant to 42 U.S.C. § 9613(g)(2), the district court, among other things, entered a final declaratory judgment holding Detrex liable for all future response costs incurred by Amcast and EPC to clean up environmental contamination from spilled trichloroethylene ("TCE") at EPC's plant in Elkhart, Indiana, including attorneys' fees, litigation expenses and prejudgment interest. In the first appeal, *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S. Ct. 691 (1994), the Seventh Circuit affirmed the declaratory judgment in all but one respect

that did not affect, at all, the entitlement of Amcast and EPC to recover all of their response costs, including attorneys' fees and litigation expenses.

Although the Seventh Circuit's opinion in the first appeal did not expressly discuss the inclusion of attorneys' fees and litigation expenses as compensable response costs (even though Detrex raised that issue, *Amcast Indus. Corp. v. Detrex Corp.*, 45 F.3d 155 (7th Cir. 1995)), App., p. 7a. Detrex did not seek a rehearing on that (or any other issue pursuant to Fed. R. App. P. 40. Rather than seek a rehearing before the Seventh Circuit, Detrex petitioned for a writ of *certiorari* from this Court. Remarkably, Detrex did not raise the recoverability of attorneys' fees and litigation expenses as CERCLA response costs as an issue for review by this Court.[2]

On September 7, 1993, Key Tronic petitioned for a writ of *certiorari* to address the inclusion of attorneys' fees and litigation expenses as CERCLA response costs. 62 U.S.L.W. 3279 (U.S. Oct. 12, 1993) (No. 93-376). Thereafter, on November 5, 1993 (almost two months after the *Key Tronic* petition for *certiorari* was filed),

---

[2] Questions presented for review from Detrex Petition for Writ of Certiorari, App., pp. 120a-122a. In the Petition for Writ of *Certiorari*, Detrex presented these questions for review:

> "(1) Whether the bulk delivery of useful hazardous substances by Petitioner in tanker trucks to Respondents' manufacturing plant falls within the scope of the exception to the definition of 'facility' which excludes consumer products in consumer use or in vessels found in the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. §§ 9601 through 9675?
>
> (2) Is a cost recovery lawsuit by a potentially responsible party against other liable parties under 42 U.S.C. § 9607(a) of the Comprehensive Environmental Response, Compensation and Liability Act an action for contribution requiring district courts to equitably apportion responsibility among the litigants after strict and joint and several liability is imposed?"

Detrex filed its petition for a writ of *certiorari*. Inexplicably, Detrex's petition for a writ of *certiorari*, filed while the *Key Tronic* petition was pending, did not raise the issue of whether CERCLA response costs include litigation costs.[3] Appellate review of the declaratory judgment against Detrex for response costs, including attorneys' fees and litigation costs, ended with Detrex's failure to raise that issue in its petition for a writ of *certiorari*.[4]

B. Procedural History of the Case and Jurisdictional Statement

After the Seventh Circuit's mandate was issued to the district court upon completion of the first appeal, the district court quantified additional response costs awarded to Amcast and EPC pursuant to the final declaratory judgment. In accordance with the final declaratory judgment that had been fully appealed, the district court, among other things, awarded Amcast and EPC $554,494.71 for attorneys' fees and litigation expenses. App., p. 34a. Detrex appealed that judgment to the Seventh Circuit.

Detrex's second appeal did not contest the amount of the attorneys' fees and litigation expenses awarded by the district court. Instead, Detrex's second appeal asserted that *Key Tronic* required reversal of the entire attorneys' fee and litigation expense award.[5] Amcast and

---

[3] On December 13, 1993, this Court granted the petition for a writ of *certiorari* in *Key Tronic*.

[4] Detrex's petition for writ of *certiorari* in the first Detrex appeal was denied by this Court. *Detrex Corp. v. Amcast Indus. Corp.*, —— U.S. ——, 114 S. Ct. 691 (1994).

[5] *Key Tronic Corp. v. United States*, —— U.S. ——, 114 S. Ct. 1960 (1994). *Key Tronic* was decided by this Court after Detrex's first appeal was final and the district court had quantified the fees and costs to which Amcast and EPC were entitled.

EPC contended that the final declaratory judgment holding Detrex liable for attorneys' fees and costs was binding under 42 U.S.C. § 9613(g)(2) (and under principles of *res judicata*) in any subsequent proceeding, including Detrex's second appeal. As a result of Detrex's first appeal, which included this Court's denial of *certiorari*, *Key Tronic* could not be applied retroactively to vacate the declaratory judgment awarding Amcast and EPC attorneys' fees and costs.

Without discussing or considering the provisions of 42 U.S.C. § 9612(g)(2), which mandates that a declaratory judgment on liability or entitlement to response costs be given binding effect on subsequent proceedings, the Seventh Circuit decided erroneously that the declaratory judgment was not to be given *res judicata* effect and was subject to *Key Tronic*'s subsequent change in the law. Thus, the Seventh Circuit reversed entirely the award to Amcast and EPC of attorneys' fees and litigation expenses as response costs.

In reversing the award of attorneys' fees and litigation costs, the Seventh Circuit recognized that, in the first appeal, it had affirmed, with an immaterial exception, the declaratory judgment that awarded Amcast and EPC attorneys' fees and expenses in an undetermined amount. *Amcast Indus. Corp. v. Detrex*, 45 F.3d 155, App., p. 3a. The Seventh Circuit correctly recognized that a final judgment is not an absolute requirement of *res judicata* or collateral estoppel. *Id.*, App., p. 5a. The Court of Appeals also correctly recognized that, in the first appeal, it decided upon full hearing and with finality that response costs include attorneys' fees. *Id.*, App., p. 7a. As the Seventh Circuit stated, "[we] had decided the issue of entitlement 'finality'." *Id.*

The Seventh Circuit, however, erroneously decided that the declaratory judgment establishing Detrex's liability and Amcast's and EPC's entitlement to recover attorneys' fees—although decided finally—was not binding,

because Detrex had not exhausted its appellate remedies from the order quantifying attorneys' fees. *Id.* In so doing, the Seventh Circuit erred by ignoring the mandate of 42 U.S.C. § 9613(g)(2) that a declaratory judgment establishing an entitlement to recover response costs under CERCLA is binding in all subsequent actions or proceedings to recover further response costs. In short, the Seventh Circuit erred by throwing out the entitlement of Amcast and EPC to attorneys' fees and litigation expenses as response costs, contrary to 42 U.S.C. § 9613 (g)(2), when the only issue properly before the Court of Appeals (but not raised by Detrex) was whether the district court had properly quantitfied the attorneys' fees and costs.

REASONS FOR GRANTING THE PETITION

CERCLA requires that a declaratory judgment establishing liability for response costs or damages is binding in all subsequent actions for further reponse costs or damages: "In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages." 42 U.S.C. § 9613 (g)(2). Hence, CERCLA's plain language, which was erroneously ignored by the Seventh Circuit, requires that the declaratory judgment awarding Amcast and EPC response costs, including attorneys' fees and expenses, which was affirmed by the Seventh Circuit, is binding regardless of *Key Tronic*'s subsequent change in the law that removed litigation costs from compensable response costs under CERCLA.

Detrex's first appeal challenged the district court's declaratory judgment awarding Amcast and EPC current and future response costs that included attorneys' fees and costs. The Seventh Circuit affirmed the declaratory judgment awarding attorneys' fees and expenses as response costs and Detrex failed to file a petition for re-

hearing on this issue. Moreover, despite the pendency of *Key Tronic* before this Court, Detrex's petition for a writ of *certiorari,* which this Court denied, failed to challenge the propriety of awarding attorneys' fees as response costs. Although, as the Seventh Circuit acknowledged in the second appeal, 42 F.3d 155, App., pp. 7a-8a,

> (a) the first appeal decided "finally" that Amcast and EPC were entitled to attorneys' fees and litigation expenses as part of their recoverable response costs,
>
> (b) the district court and the Seventh Circuit fully heard Detrex's arguments on this issue, and
>
> (c) Detrex's petition for *certiorari* could have sought (but did not seek) review of this issue by this Court,

the Seventh Circuit, in the second appeal, did not give the declaratory judgment binding effect. Thus, the Seventh Circuit erroneously, and contrary to the express language of 42 U.S.C. § 9613(g)(2), reversed the award of attorneys' fees.

It is fundamentally unfair to deny Amcast and EPC the benefits of the declaratory judgment awarding them attorneys' fees and litigation expenses as response costs (a) when that judgment, on that precise issue, was appealed to and affirmed by the Seventh Circuit, and (b) Detrex, in its first appeal, petitioned unsuccessfullly for a writ of *certiorari* from this Court while failing to raise the issue of whether response costs include attorneys' fees. This harsh result, which rides roughshod over the express language of 42 U.S.C. § 9613(g)(2), should not be tolerated by this Court, because Detrex, through its first appeal to the Seventh Circuit and its petition for a writ of *certiorari,* had a full, fair and adequate opportunity to litigate whether recoverable response costs include litigation expenses. Yet, after that issue was decided finally in favor of Amcast and EPC and the

awarded attorneys' fees were quantified, the benefit of the declaratory judgment is denied Amcast and EPC because of a change in law occurring *after* the final adjudication of Amcast's and EPC's entitlement to these sums.

In addition to the fundamental unfairness resulting from the Seventh Circuit's decision, the Seventh Circuit's decision, if upheld, defeats CERCLA's plain language and Congress's manifest intent by ignoring the requirements of 42 U.S.C. § 9613(g)(2). *Certiorari* should be granted because the Seventh Circuit's opinion, if upheld, treats 42 U.S.C. § 9613(g)(2) as meaningless surplusage to the complete frustration of the Congressional intent underlying CERCLA's statutory framework. Congress has determined that a party found to be entitled to recover response costs in an initial cost recovery action should not be subject to the burden and expense of relitigating the entitlement issue in subsequent proceedings to recover further response costs. This clear Congressional intent, manifested unambiguously in the statutory language, is particularly undermined by the Seventh Circuit's decision in this case, because Detrex fully litigated this issue in the first appeal and lost, and this Court denied Detrex's petition for a writ of *certiorari*.

Moreover, the policy interest underlying 42 U.S.C. § 9613(g)(2), which is consistent with *res judicata* principles that maintain the predictability, reliablity and finality of judgments entered by the federal courts, is completely destroyed by the Seventh Circuit's decision. The Seventh Circuit's decision at issue reversed a declaratory judgment, final after review by the Seventh Circuit and this Court's denial of a writ of *certiorari*, on the basis of a retroactive application of a change in law.

A writ of *certiorari* should be granted in this case because the Seventh Circuit has decided an important question of federal statutory law in a way that treats a key provision of CERCLA as meaningless surplusage to the

frustration of both (a) unambiguously expressed Congressional intent and policy of finality underlying 42 U.S.C. § 9613(g)(2), and (b) *res judicata* principles for preserving the predictability, reliability and finality of judgments, particularly declaratory judgments under CERCLA. CERCLA, 42 U.S.C. § 9613(g)(2), mandates that the declaratory judgment awarding Amcast and EPC attorneys' fees and litigation costs as part of their recoverable response costs, which has been fully appealed once before, should not be reversed by a change in law that occurred after the conclusion of the first appeal.

The second issue raised by this petition for writ of *certiorari* is whether *res judicata* or collateral estoppel principles bar the application of a subsequent change in law to this case. *Certiorari* should be granted on this second issue because the Seventh Circuit misapplied this Court's recent precedents in *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 111 S. Ct. 2439 (1991) and *Harper v. Virginia Dep't of Taxation,* —— U.S. ——, 113 S. Ct. 2510 (1993), which establish that a change of law is not applied to other cases where barred by procedural requirements or *res judicata. James B. Beam Distilling Co.,* 501 U.S. at 544, 113 S. Ct. at 2445.

I. CERCLA, 42 U.S.C. § 9613(g)(2), MANDATES THAT THE DECLARATORY JUDGMENT AWARDING AMCAST AND EPC RESPONSE COSTS THAT INCLUDE ATTORNEYS' FEES AND LITIGATION EXPENSES, WHICH WAS AFFIRMED IN AN EARLIER APPEAL, IS BINDING IN A SUBSEQUENT PROCEEDING AND APPEAL REGARDLESS OF A CHANGE IN LAW ANNOUNCED AFTER THE CONCLUSION OF THE FIRST APPEAL

A. Statutory Language and Legislative History

In every case involving statutory construction, the starting point is the language of the statute itself. *Greyhound Corp. v. Mt. Hood Stages, Inc.,* 437 U.S. 322,

330, 98 S. Ct. 2370, 2375 (1978). If the statutory words are clear, then there is neither need nor warrant to look elsewhere. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492, 67 S. Ct. 789, 793 (1947). A court should depart from the official text of the statute and seek extrinsic aids to its meaning only if the language is not clear, *United States v. Missouri Pacific R.R. Co.*, 278 U.S. 269, 278, 49 S. Ct. 133, 136 (1929), or if the apparent clarity of language leads to an absurd result when applied. *United States v. American Trucking Ass'ns.*, 310 U.S. 534, 543-44, 60 S. Ct. 1059, 1063-64 (1940).

CERCLA, 42 U.S.C. § 9613(g)(2), provides that once an entitlement to response costs or damages is established, that determination becomes binding in all future actions to recover further response costs or damages: "In any such action described in this subsection, the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages."

Section 9613(g)(2) is an integral component of CERCLA's intended goal of promoting private party cleanups of pollution:

> "These sections envision that, before suing, CERCLA plaintiffs will spend some money responding to an environmental hazard. They can then go to court and obtain reimbursement for their initial outlays, as well as a declaration that the responsible party will have continuing liability for the costs of finishing the job.
>
> This system strikes a balance between a number of considerations. By requiring a plaintiff to take some positive action before coming to court, CERCLA ensures that the dispute will be ripe for judicial review. [Citation omitted.] On the other hand, by not requiring plaintiffs to perform full cleanup before

> coming to court, and by expressly providing for declaratory judgments, CERCLA substantially reduces the risk involved in performing the cleanup. This encourages private response. [Citation omitted.] Similarly, actual cleanup is encouraged by requiring plaintiffs to incur response costs before they can recover them. Since CERCLA places no strings on the award of response costs, allowing recovery for future costs absent any binding commitment to incur these costs would leave no incentive to complete the cleanup."

In re Dant & Russell, Inc. v. Burlington N. R.R. Co., 951 F.2d 246, 249-50 (9th Cir. 1991).

The statute's clear language permits cost-recovery plaintiffs such as Amcast and EPC, after they have incurred some (but not all) response costs, to bring an initial cost recovery action in which the court will determine the defendant's liability for further response costs. CERCLA's statutory scheme precludes a defendant found liable for response costs from relitigating the plaintiff's entitlement to recover response costs in subsequent proceedings brought to recover further response costs.

Since the statutory language is clear and unambiguous, the legislative history of § 9613(g)(2) need not be considered. If the legislative history of § 9613(g)(2) were considered, however, its provenance firmly supports the preservation of Amcast's and EPC's declaratory judgment:

> "The conference substitute also provides, as did the House amendment, for the entry of a declaratory judgment, *which is to have a binding effect in future claims for future response costs as to the vessel or facility in question.* This is consistent with the overall structure of CERCLA, which contemplates that the President may bring a series of claims for response costs under section 107, injunctive relief under section 106, or actions for access under section

> 104 without regard to a particular site or facility. If the President brings an earlier action for such claims, he is not barred in a subsequent action from bringing other claims. The doctrine of collateral estoppel remains applicable in these actions." Superfund Amendments of 1986, Legislative History, P.L., 99-499, p. 223. (Emphasis added.)

The House Committee amendment to CERCLA contemplated that there would be successive cost-recovery actions brought at various points during implementation of a remedial action, but that liability would be determined once in the initial cost recovery action: "In the initial cost recovery action, in order to conserve judicial time and resources, the court is to enter a declaratory judgment on liability for response costs; this judgment will be binding in future cost recovery actions to obtain additional costs." Legislative History, P.L. 94-499, p. 21. CERCLA's legislative history confirms the intent of Congress that, once liability for response costs was determined in the initial cost-recovery action, that declaratory judgment establishing an entitlement to recover response costs would not be subject to relitigation in a subsequent proceeding to recover or quantify additional response costs, but instead would be binding on the responsible party defendant.

Here, the language of 42 U.S.C. § 9613(g)(2) is clear. Once liability has been determined in an initial cost-recovery action, the court's declaratory judgment on liability and damages is binding in any subsequent proceeding to recover further costs. In this case, the initial cost-recovery action resulted in a declaratory judgment holding Detrex liable and awarding Amcast and EPC incurred and future response costs that included attorneys' fees and litigation expenses. That declaratory judgment became final as a result of Detrex's first appeal. The decision of the Seventh Circuit in this second appeal to vacate the final declaratory judgment on the basis of a change in law that occurred *after* Petitioners' right to

recover attorneys' fees as response costs and expenses was finally established contravenes the clear and unambiguous statutory language of 42 U.S.C. § 9613(g)(2).

Moreover, if the legislative history of § 9613(g)(2) of CERCLA is considered (and it need not be), then that history shows a clear Congressional intent to disallow relitigation in a subsequent proceeding of a declaratory judgment on liability for response costs established in the initial cost-recovery proceeding. Thus, the decision of the Seventh Circuit contravenes the intent of Congress as shown by the legislative history of § 9613 of CERCLA and for this reason must be reversed. By ignoring the plain language and intent of § 9613, the Seventh Circuit has done excessive violence to CERCLA's statutory scheme, to the detriment of Amcast, EPC and future litigants.

B. Detrex Fully and Completely Litigated the Recoverability of Attorneys' Fees as Response Costs in the First Detrex Appeal; the Seventh Circuit Erred in Not Giving the Declaratory Judgment Binding Effect as to Amcast's and EPC's Entitlement to Attorneys' Fees

The Seventh Circuit's opinion correctly recognized that in *Miller Brewing Co. v. Joseph Schlitz Brewing Co.*, 605 F.2d 990, 996 (7th Cir. 1979) and *Gilldorn Savings Ass'n v. Commerce Savings Ass'n*, 804 F.2d 390, 393 (7th Cir. 1986), it had adopted Judge Friendly's holding in *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2d Cir. 1961) that a final judgment in the sense of 28 U.S.C. § 1291 is not required for the application of the doctrines of *res judicata* or collateral estoppel. *Amcast Indus. Corp. v. Detrex*, 45 F.3d 155, App., p. 3a-4a. The *Lummus* rule is

> "Whether a judgment, not 'final' in the sense of 28 U.S.C. § 1291, ought nevertheless be considered 'final' in the sense of precluding further litigation of the same issue, turns upon such factors as the nature

> of the decision (*i.e.*, that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review. 'Finality' in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again."

297 F.2d at 89.

The Seventh Circuit erred by misapplying the *Lummus* rule in this case when it declined to give the declaratory judgment on entitlement to attorneys' fees binding effect. Significantly, the Seventh Circuit recognized, 45 F.3d 155, App., p. 7a:

> ". . . superficially at least, the *Lummus criteria seem fulfilled in this case.* We had decide, upon full hearing and, we thought, with finality, that response costs do include attorneys' fees. *Certiorari* had been sought and denied. The issue was concluded, and could not have been reexamined by the district court; only the amount of attorneys' fees, not the plaintiff's entitlement to them, remain for further consideration. *We decided the issue of entitlement 'finally.'* " (Emphasis added.)

Nonetheless, the Seventh Circuit erroneously reasoned that the *Lummus* rule did not apply to bar relitigation of Amcast's and EPC's entitlement to recover attoreys' fees, because Detrex had not exhausted its appellate remedies. *Id.* App., p. 7a. The Seventh Circuit reached its conclusion despite the facts that the declaratory judgment on entitlement to response costs that included attorneys' fees and litigation expenses (a) was not tentative, (b) resulted from a full hearing in the district and appellate courts, and (c) Detrex had a full opportunity to be heard on the issue in the first Detrex appeal.

The Seventh Circuit's decision is wrong because it ignored the results of the first Detrex appeal, and, more importantly, ignored the requirements of 42 U.S.C. § 9613(g)(2) that the declaratory judgment establishing

an entitlement to recover attorneys' fees as damages was binding in the district court proceeding which quantified attorneys' fees and in this second appeal taken from that quantification order. Since § 9613(g)(2) mandates that the declaratory judgment has an ongoing binding effect, the Court of Appeals erred in failing to give the declaratory judgment binding effect. The Seventh Circuit should have concluded that the resolved issue of Amcast's and EPC's entitlement to recover attorneys' fees as response costs was binding upon Detrex and that the only issue left open for appeal related to the reasonableness of the quantification, an issue that Detrex did not raise on appeal.

In addition. the Seventh Circuit erred in concluding that the *Lummus* factors were not met. The *Lummus* factors, including adequacy of the hearing and opportunity to be heard, were met in this case. Detrex had a full and complete opportunity throughout the district court and first appeal proceedings to litigate the issue of whether recoverable response costs include attorneys' fees. Thus, in applying the *Lummus* rule, the Seventh Circuit erred in failing to find that the declaratory judgment establishing an entitlement to recover attorneys' fees was binding.

II. THE SEVENTH CIRCUIT'S FAILURE TO GIVE BINDING EFFECT TO THE DECLARATORY JUDGMENT ON PETITIONERS' ENTITLEMENT TO RECOVER ATTORNEYS' FEES VIOLATES THE PRINCIPLES ESTABLISHED BY THIS COURT GOVERNING THE EFFECT OF A CHANGE IN LAW ON FINAL JUDGMENTS

As previously shown under the *Lummus* factors, the declaratory judgment on Petitioners' entitlement to recover attorneys' fees was final for the purposes of *res judicata* or collateral estoppel. This Court's decision in *Federated Dep't. Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S. Ct. 2424, 2428 (1981) established the prin-

ciple that the *res judicata* consequences of a final judgment on the merits are not "altered by the fact that the judgment may have . . . rested on a legal principle subsequently overruled in another case." More recently this Court has established the rule that a change in law will be given retroactive effect to all other pending cases *only if* its application is not barred by procedural requirements or *res judicata*. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544, 111 S. Ct. 2439, 2445 (1991); *Harper v. Virginia Dept. of Taxation*, —— U.S. ——, 113 S. Ct. 2510, 2517 (1993). In *James B. Beam Distilling Co.*, 501 U.S. at 543, 111 S. Ct. at 2444, this Court held: "[W]hen the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or *res judicata*."

Thus, the Seventh Circuit also erred in failing to determine that the application of a change in law that occurred after Petitioners' entitlement to recover attorneys' fees was established by a final declaratory judgment is barred by *res judicata* or collateral estoppel. Even if the final declaratory judgment that recoverable response costs include attorneys' fees is "wrong" under the subsequent rule of law established in *Key Tronic*, the *res judicata* or collateral estoppel effect of the final declaratory judgment holding Detrex liable for the costs prevails and is not affected by the change in law announced in *Key Tronic*. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. at 399, 101 S. Ct. at 2428; *James B. Beam Distilling Co. v. Georgia*, 501 U.S. at 544, 111 S. Ct. at 2445. This result is completely consistent with 42 U.S.C. § 9613 (g)(2) and amplifies the propriety of accepting review of the Seventh Circuit's decision.

CONCLUSION

Accordingly, the petition for writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

ANN WIGHTMAN *
PAUL L. HORSTMAN
MARY L. WISEMAN
FARUKI GILLIAM & IRELAND
600 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, OH 45402
(513) 227-3707
Attorneys for Petitioners

* Counsel of Record